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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

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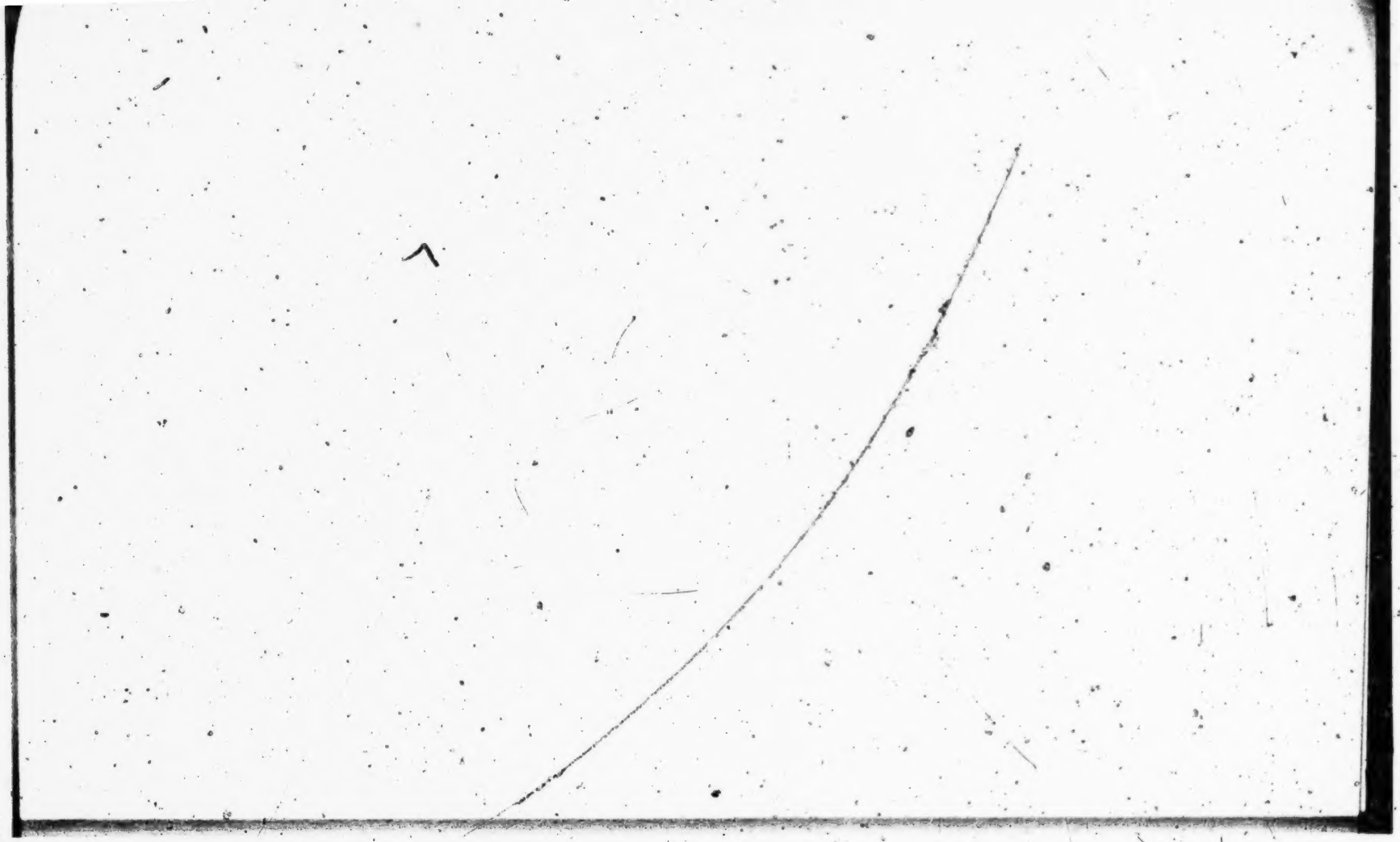

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 152

NEWTON W. LUMBRA, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF FOR PETITIONER.

Statement of the Case.

This is an action at law brought in the United States District Court for the District of Vermont by Newton W. Lumbra, petitioner, against the United States of America, respondent, for the recovery of benefits upon a War Risk Insurance Policy.

Trial was by jury and a verdict and judgment was rendered in favor of Newton W. Lumbra against the United States of America, for $8,912.50. An appeal from said judgment was taken by the respondent to the Circuit Court of Appeals for the Second Circuit, which reversed the judgment of the district court.

The petitioner was a soldier in the United States Army from 1917 to 1919 and carried a policy of War Risk In-

surance, which lapsed for non payment of premiums on May 1, 1919.

These facts were admitted in Respondent's Answer.

Action was brought by the petitioner under Title 38, Sec. 445 U. S. C. A., which authorizes suits against the United States on policies of War Risk Insurance under Title 28, Sects. 762, 763 and 765 U. S. C. A., known as the Tucker Act.

The question involved was whether or not the petitioner had become permanently and totally disabled within the meaning of the War Risk Insurance Act and Treasury Decision 20 W. R., promulgated pursuant thereto at the date the policy lapsed for non payment of premiums. At the conclusion of the case respondent moved for a directed verdict, which motion was denied. Judgment was entered upon the verdict.

The case was appealed to the Circuit Court of Appeals for the Second Circuit by the respondent, the United States, and said court reversed the judgment of the United States District Court for the District of Vermont in an opinion filed March 6, 1933. The sole ground of the reversal was that as a matter of law the proof of the permanency of petitioner's admitted total disability at the time while his contract was in force was a matter which required expert medical evidence, and because no such evidence was offered, petitioner failed to establish his claim.

The opinion of the Circuit Court of Appeals for the Second Circuit is reported in 63 Fed. (2) 796.

Petitioner was in the trenches with the American Expeditionary Forces in France (R. 20), and on the way to his dugout in the early morning of June 17, 1918, when a high-explosive shell exploded making a crater twenty feet across and ten or twelve feet deep and throwing him to the ground and rendering him unconscious. When he regained consciousness he was very shaken and weak and beads of

perspiration stood out over his body. He remained in the dugout until that night when he was taken to the hospital, where, after first aid treatment was administered, he was later removed to a base hospital. While in the hospital he had fainting, weak spells, dizzy spells, everything would appear black to him, he would perspire freely and he would have to sit down. This condition would occur sometimes once a week and sometimes more often. These spells continued about once or twice a week, becoming worse. Following his discharge from the hospital he returned to his outfit but never joined his company in its active combat but was continuously kept on light duty during the remainder of his time in the Army. At the time of his discharge from the Army he would become dizzy and weak and everything would appear black to him, and he would have to sit down in order to keep from falling. He suffered terrible pains in the head which started in the back and worked over the top of his head, which pains would sometimes continue for a whole day at a time. During 1919 and 1920 he went to Dr. Hunt a number of times to whom he described his condition and he treated him for nerve trouble. He last saw Dr. Hunt in 1921. The nerve spells increased in intensity and frequency as time went on until in 1922, or early in 1923, they became so severe that he would lapse into unconsciousness in these spells, which were becoming more frequent and more severe and would come on sometimes without warning, but at other times (R. 34) he had terrible pains in his head for a day or two preceding the spells. He rested for four months after his discharge (R. 25) and there was a marked change in his appearance upon his return from the Army which was noticed by substantial members of his community and they knew he was suffering from something (R. 66, 73, 74). He seemed to these people like a man who had suffered a

shock and he was complaining of the head pains (R. 107, 117, 144, 69, 79). He was given work by his former employer of the same type as he had before service, but was unable to perform it and was given lighter work. Because he couldn't work half the time (R. 27, 140), he was discharged from this employment. He again rested for a few months on his sister's farm and then secured employment with the Central Vermont Railroad. His work there was changed from time to time, always to a lighter work and there was evidence from several of the officials and fellow employees of the railroad that he was unable to do any of the work to which he was assigned but was kept employed because of their sympathy for him as a wounded ex soldier. His fellow employees did a large part of his work and but for this consideration given him he could not have held his job nor would the railroad have kept him on it (R. 108, 109, 110, 122, 123, 128, 129, 130, 133, 134, 135, 136, 137, 138, 139). He received aid from the American Legion in the form of groceries and wood and that organization paid his rent. From 1926 to the date of the trial he had been in seven hospitals for periods of from two weeks to two months and an attendant was sent with him when going to and from the hospitals; he had been unable to work at all since 1929 though he had tried to secure work but could not because of his condition. There was the evidence of three competent physicians who had seen him in these spells or immediately following them and who had treated him for them and diagnosed them as epilepsy and all three stated that the condition he was in when they saw him was permanent in that they knew of no cure for these attacks. Two of these doctors testified that the condition in which they saw him sometime preceding the trial, was a result of the injury received by him in France.

The case was appealed to the Circuit Court of Appeals for the Second Circuit by the United States, and said court reversed the judgment of the United States District Court for the District of Vermont in an opinion filed March 6, 1933. The question involved in the Circuit Court of Appeals was whether or not there was sufficient evidence of the insured's permanent and total disability at the time his policy lapsed for non payment for the trial court to submit the case to the jury, and the Circuit Court of Appeals for the Second Circuit found that while a jury might properly find that while the term insurance contract in question was in force the insured could not engage continuously in any gainful occupation, and was suffering from total disability, yet the question of the permanency of the insured's total disability was not established by reason of the fact that no expert testimony of such permanence was produced and the petitioner failed to establish his claim because of a lack of such expert testimony.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the permanence of a total disability at date of lapsation of policy for non payment of premium was a fact requiring expert evidence.

2. The Circuit Court of Appeals erred in holding that because no expert evidence was produced of the permanence of petitioner's total disability at date of lapsation of policy for non payment of premium, the petitioner failed to establish his claim.

Brief of the Argument.

POINT ONE. The holding that the permanence of a total disability at date of lapsation of policy for non-payment

of premium was a fact requiring expert evidence is in direct conflict with the rule of law of this Court applicable to such cases and with the well settled and universally recognized rule of law as announced in the decision of this and other courts.

Point Two. The requirement of expert evidence in establishing the permanency of a total disability, disregards other competent substantial evidence of permanent disability.

Point Three. The establishment of the fact of permanency under well reasoned and considered decisions of the courts in cases similiar to this, has not been held to require expert opinion.

Point Four. The acts of Congress and the regulations issued by the Executive Branch of the Government pursuant thereto indicate that the permanency of a total disability at date of lapsation of a War Risk Term Insurance contract is determined by the continuation of that total disability over a period of time, which obviously is not a matter requiring expert medical testimony.

Point Five.—The continuation of total disability is a physical fact not requiring the opinion of an expert.

Point Six.—To require expert medical evidence in establishing the permanence of a total disability while a contract of war risk insurance was in force contravenes the rule of liberal construction established by this Court.

Point Seven.—A jury can determine permanent disability without the aid of expert medical testimony.

ARGUMENT.

I.

THE HOLDING THAT THE PERMANENCE OF A TOTAL DISABILITY AT DATE OF LAPSATION OF POLICY FOR NON-PAYMENT OF PREMIUM WAS A FACT REQUIRING EXPERT EVIDENCE IS IN DIRECT CONFLICT WITH THE RULE OF LAW OF THIS COURT APPLICABLE TO SUCH CASES AND WITH THE WELL SETTLED AND UNIVERSALLY RECOGNIZED RULE OF LAW AS ANNOUNCED IN THE DECISION OF THIS AND OTHER COURTS.

In the opinion of the Circuit Court of Appeals the following language was used: "The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919, were reasonably certain to produce permanent disability. No such evidence was produced and the plaintiff failed to establish his claim because it was lacking." (Cases cited.) "This result is in accordance with the rule laid down in *Clapp* v. *United States*, the opinion of which is filed herewith."

In *Clapp* v. *United States*, the following language is used relative to the need of expert medical testimony: "It was a strictly medical question; without the help of those skilled in the science the conclusions of laymen upon such an issue were without adequate basis and necessarily mere speculation. Only those familiar with the origin and course of the malady were competent to testify and without testimony a verdict stood unsupported."

The two opinions quoted are an interpretation by the Circuit Court of Appeals of the following language in Regulation No. 11, Treasury Decision 20, W. R., March 9, 1918,

relative to the definition of the term "total and permanent disability." "'Total disability' shall be deemed to be 'permanent', whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." This clause has become in effect one of the clauses of the War Risk Policy issued to the petitioner since the policy was issued subject to such rules and regulations as Congress might adopt and the regulation in question was adopted under specific authority of Congress. The Circuit Court of Appeals, in its ruling relative to medical testimony above quoted, has added a further clause to the regulation so that the regulation coupled with the interpretation of the Circuit Court of Appeals in this case would read: "Total disability" shall be deemed to be "permanent," whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it *provided these conditions are proven by expert medical testimony of such conditions as of date of lapsation of the policy.*

The action of the Circuit Court of Appeals is equivalent to adding to regulation No. 11 a new regulation requiring a particular type of evidence as a condition of recovery. If this were part of the regulation promulgated by the Treasury Department, it would be equivalent to evidential requirements in written contracts which almost universally have not been upheld by the courts. The action of the Circuit Court of Appeals in adding this regulation was error and should not now be upheld. If such a regulation were part of the contract itself the Court would not uphold it and, therefore, since made a part of the contract by the Circuit Court of Appeals it should not now be upheld.

NO PARTICULAR TYPE OF EVIDENCE MAY BE REQUIRED BUT ALL MATERIAL AND RELEVANT

EVIDENCE, WHETHER DIRECT OR CIRCUMSTANTIAL, MUST BE SUBMITTED.

There are several types of contracts in which the contracting parties stipulate as to a rule of evidence or a kind of evidence by which the court must be bound in litigation subsequently arising under such contract. Such stipulations are most common in surety contracts and in insurance policies. They are particularly common in accident and health policies and in such policies there is generally a requirement that an accidental injury must be proved by an eye witness, or by direct and positive proof and numberless variations of these clauses. The courts very generally have not permitted the course of justice upon trials before them to be contracted about in such manner as to defeat the ends to be subserved by such trials. The parties to the contract cannot agree to oust the courts of jurisdiction over such a contract. This Court in passing upon such a clause in an accident policy used the following language: "The requirement, however of direct and positive proof, as to certain matters, did not make it necessary to establish the fact and attendant circumstances of death by persons who were actually present when the insured received the injuries which causes his death * * * The evidence on that point was direct and positive, as much so, within the meaning of the policy as if it had come from one who saw the pistol fired and the proof on this point is none less direct of positive because supplemented or strengthened by evidence of a circumstantial character."

> "While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence the facts and circumstances justified." *Travellers Insurance Co. of Hartford, Conn.* v. *Sadie P. McConkey*, 127 U. S. 661.

This case has been favorably commented upon in *Connecticut Mutual Life Insurance Company of Hartford v. Akens* in 150 U. S. in the following language: "And in making out such proof, the plaintiff is entitled to the benefits of the presumption that a sane man would not commit suicide and all other rules of law established for the guidance of courts and juries in the investigation and determination of facts."

Connecticut Mutual Life Ins. Co. of Hartford v. Akens, 150 U. S. 468, 37 L. Ed. 1148.

New Orleans, etc. v. National Rice Mills Co., 234 U. S. 80, 39 Sup. Ct. 726, 58 L. Ed. 1223.

Preferred Accident Insurance Co. v. Barker, 93 Fed. 158 (C. C. A. 5).

Jenkins v. Pacific M. L. Insurance Co., 131 Calif. 121, 63 Pac. 180.

National Accident Society v. Rolstin, 101 Ill. Appeals 192.

Travellers Insurance Co. v. Shepard, 85 Ga. 751, 12 S. E. 18.

Utter v. Travellers Insurance Co., 65 Mich. 545.

Rawlins v. Business M. A. Asso., 204 Mo. App. 679, 220 S. W. 1022

Reynold v. Equitable Accident Co., 48 Hun. N. Y. 605, 1 N. Y. 738.

N. Y. Life Insurance v. Brown, 39 Fed. (2) 376 (C. C. A. 5).

Ruling Case Law in treating provisions in contracts similar to this states the rule to be laid down in *Travellers Insurance Co. v. McConkey* and holds that to be the rule as established by the great weight of authority.

6 R. C. L. 754, 755.

In Charter Oak Life Insurance Co. v. Rodell, the policy required due and satisfactory evidence of the death and of the just claim of the assured under this policy. One objection was to the submission of the case to the jury upon lay evidence of the insanity of the assured. In disposing of this objection the court said "Although such testimony from ordinary witnesses may not have great weight with experts, yet it was competent testimony and expressed in an unartificial way the impressions that are usually made by insane persons upon people of ordinary understanding." It is petitioner's contention in the instant case that while lay witnesses may not have great weight with experts in proving a fact in which a condition of health is involved, nevertheless such testimony was competent testimony and was properly submitted to the jury. If, under the instruction the court has given in this case, the jury was satisfied that the fact was proved then no further requirement should be made by the Circuit Court of Appeals relative to the proof of this fact.

Charter Oak Life Insurance Co. v. Rodell, 95 U. S. 232, 24 L. Ed. 433.

A definitely established rule on contracts requiring a particular type of proof is that any such requirement does not preclude the use of circumstantial evidence or even the reliance wholly upon such evidence, since to exclude these forms of evidence would be to permit the policy to control and abrogate the established rule of law that a contract may be supported by circumstantial evidence in violation of the further rule that such a conflict must be reconciled by adherence to the law and repudiation of the contract provision. The reason given for holding this as an established rule of law in this class of cases in that the courts are not disposed to favor stipulations or agreements, in effect, tending to overthrow the established rules of evidence.

Travellers Ins. Co. v. McConkey, supra;
2 Couch on Insurance, 1512;
7 Couch on Insurance, 5495;
Rawlins v. Business Men's Accident Asso., 204 Mo. App. 679, 220 S. W. 1022;
Roch v. Business Men's Protective Asso., 164 Iowa 199;
Utter v. Travellers Insurance Co., 65 Mich. 545;
Lewis v. Brotherhood Accident Co., 194 Mass. 1;
Pryde v. Interstate Business Men's Accident Asso., Iowa (216 N. W. 62), 62 A. L. R. 31.

A provision requiring direct and positive proof of death in accident policies has been generally held ineffective by the courts and the courts in passing upon such policies have almost uniformly held that all material evidence, whether direct or circumstantial, was properly admissible to determine this fact.

Travellers Insurance Co. v. Shepard, 85 Ga. 751;
Mitchell v. Brotherhood Locomotive F. E., 103 Neb. 791;
Accident Insurance Co. v. Bennett, 90 Penn. 791;
Jenkins v. Hawkeye Comm. Men's Asso., 147 Iowa 113.

Stipulations in contracts making certain evidence competent prima facie, or conclusive evidence of a fact, have generally been held void by the courts as contrary to public policy regardless of the propriety of the policy or motive involved in the particular case.

The Circuit Court of Appeals has, therefore, written into this insurance contract by its holding a clause which, if inserted by the Government, the insurer, would not be upheld by this Court in view of its well reasoned decisions. Since this Court and the majority of courts passing on a provision similar to this in insurance policies have uniformly held that no particular type of proof could be re-

quired except the usual rules of evidence in such cases, the Circuit Court of Appeals erred in setting up such a rule and the question of permanence in this case should be decided on the uniformly recognized and established rules of evidence. It is respectfully contended that since the Circuit Court of Appeals found no error in the evidence as submitted under recognized rules, the judgment of the district court should be affirmed.

II.

THE REQUIRING OF EXPERT TESTIMONY IN ESTABLISHING THE PERMANENCY OF A TOTAL DISABILITY DISREGARDS OTHER COMPETENT SUBSTANTIAL EVIDENCE OF PERMANENT DISABILITY.

Motion was made by the respondent for a directed verdict at the close of the case in the district court, based upon the alleged general insufficiency of the evidence to establish total and permanent disability, which motion was overruled by the trial court and the jury found for petitioner. The Circuit Court of Appeals in its opinion indicated that while there was sufficient evidence of the totality of petitioner's disability in 1919, there was no sufficient evidence of its permanency, and for this sole reason reversed the action of the lower court.

That the party, against whom the motion for a direct verdict is made, is entitled to the most favorable aspect of the evidence and all reasonable inferences to be drawn therefrom, is too well settled to merit argument and with such fact in mind it is necessary to consider the evidence adduced on behalf of the petitioner in determining what inferences can be indulged in from that evidence.

The Circuit Court of Appeals in its opinion said:

> "In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation."

Thus it will be seen that the Circuit Court of Appeals held that there was sufficient evidence of the totality of the disability. This leaves us with the question only of the permanency of that disability and whether there is any substantial evidence, or reasonable inference therefrom, upon which the jury could proceed to find that such disability was permanent.

Lambra was suffering from epilepsy. In view of the nature of this disability even the medical profession must have facts seldom found on personal examination in order to even make a diagnosis, without even considering a prognosis, which must necessarily follow the diagnosis.

Dr. S. A. Kinnier Wilson, one of the two foremost neurologists of England, in his recently published collection of essays on "Modern Problems in Neurology" (William Wood & Co., New York) at page 19 states:

> "In the course of practice cases come under notice which present intimate or remote similarities to the phenomena of epilepsy as usually understood, but which do not seem to resemble each other, at least not superficially. For the data in many instances one has to rely on descriptions furnished by either the patient or his friends (there is no reason, of course, to doubt these descriptions are veridical) since development of symptoms during consultation and examination seldom occurs."

Sir William Osler (8th Edition) on the "Principles and Practice of Medicine" with reference to the prognosis of epilepsy, at page 1085 states:

> "Prognosis.—This may be given today in the words of Hipocrates: 'The prognosis in epilepsy is unfavor-

able when the disease is congenital, and when it endures to manhood, and when it occurs in a grown person without any previous cause * * *. The cure may be attempted in young persons, but not in old.' ''

Walter E. Bell testified that he was a corporal in Lumbra's platoon, seeing him at least twice daily and oftener and before he was injured he knew of him having no physical disabilities and with Lumbra went through the same barrage that injured Lumbra (R. 44).

Captain R. H. Pollard testified that he was a sergeant and present when the bombardment took place in which Lumbra was injured; that he saw Lumbra on his return home at which time he noticed a change; as when Lumbra entered the service as a recruit he was a husky lad, looked like a country boy full of life and ready to do anything and the way he appeared on board ship on his return home he didn't care much about what happened, appeared listless, lifeless and didn't appear the same, but it was a marked change (R. 61).

Cordes M. Foley (R. 65) testified that he knew Lumbra since he was a very small boy at which time he was a normal healthy boy full of fun and jokes and was active and performed his work satisfactorily before he entered the army; and that shortly after his return home (R. 66) he noticed that Lumbra was more sober and slow; his face was more flushed than it was when he enlisted and he was not as active as before; and he appeared tired; that he did try to work at different times and places (R. 67); and after his return (from France) he was around the village more than before; and that in (R. 69) 1920 or 1921 Lumbra complained of headache and backache.

Charles H. Dow (R. 72) testified that he knew the insured since 1913 and that the insured worked under him in 1916, at which time he appeared to be a good rugged

man and his work was satisfactory, working at heavy work (R. 73); that in 1919 Lumbra worked for him for a short time but he didn't work very long because he was unsteady and they didn't keep him on the job although they tried him at other places; that he was not as good a worker as before; that he was not the same kind of man; and wasn't capable of doing the work and as petitioner did not work every day they didn't keep him, and finally discharged him because of his unsteadiness; he testified that petitioner complained of not being well and he, too, noticed a change in petitioner after his return home after the war.

Louis J. Paquette testified that he knew petitioner Lumbra since 1924 at which time the witness was commander of the American Legion in which capacity he investigated petitioner's case and found he needed help and had him sent to the hospital and had his family taken care of temporarily, by buying for them groceries, paying their rent and buying coal; that for a period of two years (R. 77, 78) Lumbra was not working steadily and in 1931 he saw Lumbra have an epileptic fit, at which time he breathed heavily, frothed at the mouth and looked like a dead person; that the witness was an employer of men (R. 79) and knew of no work that Lumbra could do with safety.

Mitchell Brissette (R. 105) testified for petitioner that before the war the petitioner worked for him handling an axe and a cross-cut saw cutting logs, working from 8½ to 10 hours a day, at which time he was very steady, a very good rough workman, very rough and rugged and as strong as a bear, in the winter of 1915-16 (R. 106); that (R. 107) he became closely acquainted with the petitioner in July, 1922, while working for the railroad (R. 108) and saw him at noon time, at night, or in the morning; that petitioner lost much time and would have spells and that when he returned to work after the spells (R. 109) he acted like a man after a long illness; that he knew petitioner

was receiving special consideration and guessed "they" must have known that he was an ex-service man or something in order for him to have held his job and that "they" were excusing him for some such reason.

Mrs. Florence Lambra testified that she married the petitioner in December 1922 and about three months later he had a fit early in the morning (R. 111.); that she heard him groan and that he fell to the floor and was unconscious for from ten to fifteen minutes and that he didn't go to work until a few days thereafter; and that these "fits" continued from that time on, he having from two to five a month (R. 112.); that in February 28, 1929, he was dismissed from his employment, having had six fits between the hours of 6 and 7 in the morning; and as a result of her talking with the doctor, learned that these fits were epileptic fits.

The foregoing evidence particularly when considered with the evidence given by the insured as set forth in the "Statement of Case" appearing on pages 1-5 hereof, it is respectfully submitted was substantial evidence which when considered by the jury together with all inferences to be drawn therefrom was sufficient to support the jury's verdict.

The requirement that this disabled war veteran and others similarly situated must produce expert medical opinion of physicians who examined them while their contracts of insurance were in full force and effect, will work an insurmountable hardship and act to preclude deserving world war veterans suffering from service-incurred disabilities from realizing upon their insurance, disability instalments when that money is most needed. When they paid their monthly premiums on this insurance they did so with the belief that they would be protected in the event of disaster. This veteran and others suffering from war injuries are now dependent to some degree, at least if not entirely, upon

local charity for their support and the support of their families. They were usually without the means with which to pay for medical attention while their contracts of insurance were in force. Nevertheless they carried on, manfully striving to regain their places in the ranks of the workers of the world and carry on after the expiration of the national emergency created by the World War, and hoping all the time that their physical conditions would improve. Some were successful, but others were not and it is this latter class of unfortunate, disabled World War veterans whose disabilities in the majority of instances were incurred in the line of duty serving their country, that find themselves now met with this rule of law enunciated by the Circuit Court of Appeals in this case.

The spirit of this legislation as shown by its history and the subsequent regulations issued pursuant thereto as set forth in Point IV hereof, as well as the liberal construction placed upon similar cases by this Court as set forth in Point VI hereof, is contravened by this opinion of the Circuit Court of Appeals.

We respectfully submit that the action of the Circuit Court of Appeals in this case indicated that it weighed the evidence and decided for itself the weight to be given thereto.

It has been recently held by the courts that the ability of a person to do particular work may properly be proven by other than expert testimony.

In the case of *U. S.* v. *Woltman*, 61 Appeals D. C. 52, a War Risk Insurance case, the jury returned a verdict for the insured and the question raised by appeal was whether it was sufficient evidence of total and permanent disability under the War Risk contract on or before the insured's discharge from military service to take the case to a jury. The Government contended in its assignments of error that

the evidence of certain non professional witnesses who were permitted to express an opinion as to the ability of the insured to follow a gainful occupation was erroneously admitted in evidence. The Court of Appeals of the District of Columbia held:

> "The evidence shows the witnesses were in a particularly favorable position to observe the insured and got their knowledge of his ability to work from conditions which were visible to an ordinarily intelligent observer and which were not of that character requiring professional diagnosis. It is always proper to permit an unprofessional witness, who has had opportunity to observe a sick or injured person, to express an opinion with respect to whether such a person is helpless or unable to work. The value of the opinion depends, of course, upon the intelligence of the witness and his opportunity to know of the condition as to which he testifies and the ordinary effect of such a condition. In this case the groundwork was sufficiently laid, and we think the evidence was properly received."

In the case of *Semet Solway* v. *Wilcox*, 143 Fed. 839, Circuit Judge Dallas in the Circuit Court of Appeals for the Third Circuit (certiorari denied 26 Sup. Ct. 764, 202 U. S. 617, 50 L. Ed. 1173), the question involved was whether or not plaintiff had been discharged from employment, plaintiff contending that because of his physical condition he was unable to do the work. The employer raised the point as to whether plaintiff should have been permitted to testify that at the time of his alleged discharge he was unable to perform the duties of his employment. This testimony was not as to the nature of his disease or any other matter about which in the absence of special learning or experience he might not have been qualified to speak. It was as to his ability, notwithstanding the state of his health, to do the work he had been employed to do. The court held that:

"Upon that subject no one could have been better informed than himself. * * * It may be confidently affirmed that a witness may always testify to any relevant fact which he has perceived by any of his senses and that his impressions respecting facts so perceived are not in every case to be excluded as being merely opinions. * * * The plaintiff's statement of his capability to discharge the duties he had assumed may, in a sense, be taken to import nothing more than that it was his impression or belief on the subject; but his impression, if impression it should be called, was at least based upon facts which he personally knew and therefore was itself a fact which the jurors were entitled to consider though they might deem it to be of but little weight. * * * There are some matters of which every man, with ordinary opportunities of observation is able to form a reliable opinion." (*Ardeso Oil Co.* v. *Gilson*, 63 Pa. 151); and the ability of the plaintiff to do the particular work which he had engaged to do was certainly a matter of which he had more than ordinary knowledge and upon which he was especially competent to form a correct judgment. That question was not one that could be determined only upon scientific theory, or by abstract reasoning, and the opinion of the plaintiff respecting it, being founded upon facts within his own knowledge and experience, is no less reliable than had he appeared to be an "expert" in the too restrictive sense in which that term has been sometimes, but not always, used. (*D. & C. Steam Towboat Co.* v. *Stars*, 69 Pa. 41).

See also *U. S.* v. *Tyrakowski*, (C. C. A. 7), 50 Fed. (2d) 766; *Malavski* v. *U. S.* (C. C. A. 7), 43 Fed. (2d) 974; *Carter* v. *U. S.* (C. C. A. 4), 49 Fed. (2d) 221; *Madray* v. *U. S.* (C. C. A. 4) 55 Fed. (2d) 552.

III.

THE ESTABLISHMENT OF THE FACT OF PERMANENCY UNDER WELL-REASONED AND CONSID-

ERED DECISIONS OF THE COURTS IN CASES SIMILAR TO THIS, DOES NOT REQUIRE EXPERT OPINION.

The opinion of the Circuit Court of Appeals in this case makes it incumbent upon the insured to prove that the permanency of his total disability was known and recognized from the very inception of the disability. This we respectfully submit is not the law.

The definition of total and permanent disability is set forth in Regulation No. 11 of Treasury Decision 20, W. R. as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantial gainful occupation shall be deemed, * * * to be total disability.
>
> "'Total Disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it."

This regulation does not require that the disability be certain to be permanent or that it be known that it absolutely will continue throughout the lifetime of the person suffering from it, but requires only that it be shown to be founded upon conditions *reasonably certain* to continue throughout the life of the person suffering.

As applied to a case involving epilepsy, it must be considered that the response to treatment, or the failure to respond to treatment, are material matters in arriving at a prognosis, and it is only after the treatment has been administered and the patient has been under observation that a fair prognosis can be made. Consequently, observation and continuation of a disease are not only of material aid, but are absolutely necessary in arriving at a proper prognosis, and to require a certain prognosis of permanency at

the day the disability first makes itself known, would pass on to this petitioner an impossible burden. Even physicians must have the benefit of the subsequent development of his disease; and it seems anomalous to say that if he has had the benefit of observation and has conclusively shown his total disability to be permanent by reason of the lapse of time to say that such total disability has not been permanent since its inception.

In the case of *Barksdale* v. *United States*, (C. C. A. 10), 46 Federal (2d) 762, which was a war risk insurance suit, the question of total and permanent disability, in a war risk term insurance case, was held to be a question for the jury *notwithstanding the plaintiff's own medical evidence to the effect that he was not permanently disabled* where his own testimony showed a continued inability to follow continuously any occupation.

The decision of the Circuit Court of Appeals in the instant case requiring expert evidence is in conflict with the rule adopted in other circuits.

In *Malarski* v. *United States*, (C. C. A. 7), 43 Fed. (2d) 974, which was a war risk insurance suit, the lower court directed a verdict for the defendant, but the Circuit Court of Appeals reversed this action and remanded the case for a new trial.

In that case a physician examined the insured in February, 1921, and found him afflicted with tuberculosis and again examined him in 1929, finding chronic quiescent tuberculosis. The physician was of the opinion that, considering the insured's condition when first examined in February, 1921, he had been afflicted with active tuberculosis for eighteen months or two years prior to that time and the disability found in 1921 was a permanent one which could not have developed in from less than one to two years.

In the case of *Madray* v. *United States*, 55 Fed. (2d) 552, a war risk insurance suit, the only question was whether the trial court was correct in directing a verdict in favor of the Government. The only testimony submitted was that of the insured himself, his mother, his brother and a friend, who had relatively slight acquaintance with him. NO MEDICAL TESTIMONY WHATEVER WAS OFFERED. In directing a verdict the trial judge remarked:

> "There has not been a single doctor to testify about his condition, not a single expert, nothing here except to show that the man was nervous and discharged for psycho-neurosis from the army and therefore under the facts in the case I will have to direct a verdict for the United States."

The Circuit Court of Appeals for the Fourth Circuit reversed the action of the trial court and with respect to permanency said:

> "Similarly on the question of whether the disability is permanent as well as total, since each case is to be put to the test of whether the conditions upon which the claims of permanency are based, render it reasonably certain that the disability will continue throughout the life of the person suffering from it, it follows that it must be left to the jury to determine the probative value of such evidence as has been submitted on this case."

Likewise in the case of *Carter* v. *United States* (C. C. A. 4), 49 Fed. (2d) 221, a war risk insurance suit, the court speaking through Senior Judge John J. Parker, said:

> "(4) And we think that under the evidence here the permanency as well as the totality of the disability was a question for the jury. A disability is permanent 'whenever it is founded upon conditions which render

it reasonably certain that it will continue throughout the life of the person suffering from it'; and where there is substantial evidence of such conditions it is for the jury to say whether or not the disability in fact exists."

In the case of *United States* v. *Tyrakowski* (C. C. A. 7) 50 Fed. (2d) 766, the only question before that court was whether there was any substantial evidence in the record to support the finding of total and permanent disability made by the lower court. In that case the insured was discharged June 14, 1919, and he first consulted a doctor July 28, 1919, by the name of Buchanan who sent him to the Veterans' Bureau. He next consulted a doctor in 1924 who likewise referred him to the Veterans' Bureau, and he next attempted to call on a doctor in 1927 at the Veterans' Bureau but was not examined. Dr. Buchanan examined the insured casually May 28, 1930, and said that based upon the examination thus obtained it would be injurious for the plaintiff to work at indoor or hard work and that such condition most likely must have existed since his first examination on July 28, 1919, although he did not really know. The only direct evidence as to insured's condition on July 31, 1919, was that of himself, his sister and Dr. Buchanan. That of the last two witnesses named was almost negative in effect so the only question presented was whether or not there was substantial evidence submitted to the effect that insured was totally and permanently disabled on or before July 31, 1919.

The court in that case held that insured's testimony alone prevented the court from answering this question in the negative in view of the Treasury Department's definition of total and permanent disability. The court stated: "From the date of his discharge we find him making practically the same complaint as to pain and suffering and the

doctors will not entirely agree as to this ailment. He testified positively that he was not able to work continuously and for that reason he was unable to hold a position for any appreciable length of time. * * * Practically all of the evidence except his own deals with his condition at a much later date than August 31, 1919. It was competent as bearing upon the matter of permanency and must be considered as substantial. * * * Of course they" (the physicians) "did not attempt to say that these diseases or any of them were present on August 31, 1919. * * * *But regardless of the doctor's testimony* appellee says that he was suffering on the trial date in the same manner but in a greater degree as he was on August 31, 1919. He does not attempt to classify his disease but may, and it is not necessary for him to do so. Neither is it necessary for him to trace its cause." The court held this was properly a jury question.

In a case involving the mental condition of the insured, *Connecticut Mutual Life Insurance Co.* v. *Lathrop,* 111 U. S., 612, 28 L. Ed. 536, a domestic in the family testified that "He looked wild and frightened out of his eyes; he looked like someone that was crazy." To another witness he appeared to be "out of his head; kind of mad; insane." And there was other testimony of a similar character. This Court stated:

> "Counsel for the plaintiff in error contends that witnesses who are not experts in medical science may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds some support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every case, civil and criminal, which

involves the question of insanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowledge, according to their mental capacity and habits of observation; matters about which they may and do form opinions, sufficiently satisfactory to constitute the basis of action. * * * The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached."

Connecticut Mutual Life Insurance Co. v. *Lathrop,* 111 U. S. 612, 28 L. Ed. 536.

The question of permanence must either be determined by a prognosis or a continuation of the fact of the existence of the disability. The rule announced by the Circuit Court of Appeals in the instant case is apparently in conflict with the rule of this Court in the case of *Connecticut Life Insurance* v. *Lathrop, supra.*

IV.

THE ACTS OF CONGRESS AND THE REGULATIONS ISSUED BY THE EXECUTIVE BRANCH OF THE GOVERNMENT PURSUANT THERETO INDICATE THAT THE PERMANENCY OF A TOTAL DISABILITY AT DATE OF LAPSATION OF A WAR RISK TERM INSURANCE CONTRACT IS DETERMINED BY THE CONTINUATION OF THAT TOTAL DISABILITY OVER A PERIOD OF TIME, WHICH OB-

VIOUSLY IS NOT A MATTER REQUIRING EXPERT MEDICAL TESTIMONY.

Long prior to the enactment of the amendments to the original War Risk Insurance Act, granting insurance to the armed forces of the United States during the late World War, which amendments were enacted on October 6, 1917, the question of insurance was prominently in the minds of the executive officers of the United States, and in this connection we quote from the letter of the Honorable W. G. McAdoo, then Secretary of the Treasury, to the then President of the United States, written July 31, 1917, and which was incorporated in the Congressional Record of the 65th Congress, Volume 55, page 6901, as follows:

> "We are not relying upon the volunteer system in this war. We are drafting men and compelling them to make, if necessary, the supreme sacrifice for their country. A higher obligation rests upon the government to mitigate the horrors of war for the fighting men and their dependents, insofar as it is possible to do so, through compensation, indemnities, *and insurance*. Less than this a just, generous, and humane government cannot do. We must set an example to the world, not alone in the ideals for which we fight, but in the treatment we accord to those who fight and sacrifice for us."

This was an expression by the Secretary of the Treasury who was to have and did have the administration of the War Risk Insurance Act, until the Veterans Bureau was created by an Act of Congress on August 9, 1921.

Mr. McAdoo was not merely expressing the sentiments of an executive officer of the Government, but the ideals and sentiments of the American people.

The Act of War Risk Insurance of October 6, 1917 (40 Stat. 409), provided that war risk insurance was to

be granted to members of our armed forces against the death or total and permanent disability of the insured, and provided among other things:

> "SEC. 400. That in order to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) * * * *greater protection for themselves and their dependents,* * * * the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000, or more than $10,000, upon the payment of the premiums as hereinafter provided."
>
> "It shall be payable only to spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them" (40 Stat. 409).

The Act of October 6, 1917, was drafted by a committee selected for that purpose and the Honorable Julian W. Mack, for many years a distinguished member of the Circuit Court of Appeals for the Seventh District, who was known as a national figure not only because of his judicial attainments but because of his ability as an instructor in the law, served as Chairman of the Committee that drafed the War Risk Insurance Act. As early as October 16, 1917, a conference was called at Washington, D. C., at which conference the Honorable Julian W. Mack presided, it being a conference between Mr. Mack, the man who drafted the War Risk Insurance Act, and such members of the United States Army as could attend. The result of this conference was published as Bulletin No. 3 of the War Risk Insurance Act under date of October 16, 1917, and is to be found in Volume 2 of the Regulations and Pro-

cedure of the United States Veterans' Bureau at page 1241 to page 1273. This Bulletin is entitled:

> "Explanation submitted by the Honorable Julian W. Mack of the provisions of the military and naval insurance act presented at a conference of officers and enlisted men of the army and navy held in Washington on October 16, 17, and 18, 1917. This explanation has the full approval of the Bureau of War Risk Insurance.
>
> WILLIAM C. DELANOY,
> *Director.*
>
> Approved:
> W. G. MCADOO,
> *Secretary of the Treasury.*"

In that conference, the Honorable Julian W. Mack stated in regard to war risk insurance:

> "Then, another provision that the Government generously added: While it based the premiums upon these extremely low term rates, it added to this provision that not only on a man's death should the policy mature, but also on his becoming totally and permanently disabled. This has nothing at all to do with the compensation provision. You pay nothing for that. The compensation is given only if the injuries are received in the line of duty. Your insurance against total disability or death is against total disability or death, no matter how it arises or when it arises, whether in the service or out of the service, because of the service or not because of the service. It is like insurance in any private company and covers all contingencies. But, as I say, added to the life insurance, the Government throws in for good measure the provision that if before death you become totally and permanently disabled, the policy will then become due." (Bulletin No. 3, Bureau of War Risk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans Bureau, at page 1258.)

At this same conference, a member of the conference asked Judge Mack the following question:

> "Your statement, Judge, of total permanent disability—suppose a man is pronounced totally and permanently disabled by a board of physicians and thereafter is develops that he has recovered somewhat. Would he still be considered under that condition, or would that word "permanent" come in, and if so, what is the effect?
>
> Judge Mack: That is a problem.
>
> A Member: That's got to be settled.
>
> Judge Mack: And I think the Bureau will settle the problem liberally." (Bulletin No. 3, Bureau of War Risk Insurance, Volume 2, Regulations and Procedure, U. S. Veterans' Bureau, at page 1265.)

The Bureau did settle the problem liberally by issuing Regulation No. 11, which was promulgated March 9, 1919, and which to this day has never been cancelled, modified or repealed so far as defining total and permanent disability for insurance purposes; it follows:

(Treasury Decision and 20, W. R.) Total Disability.

Regulation No. 11 relating to the Definition of the term "Total Disability" and the determination as to when "Total Disability shall be deemed permanent.

Treasury Department, Bureau of War Risk Insurance.

Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

"ANY IMPAIRMENT OF MIND OR BODY WHICH RENDERS IT IMPOSSIBLE FOR THE DISABLED PERSON TO FOLLOW CONTINUOUSLY ANY SUBSTANTIALLY GAINFUL OCCUPATION SHALL BE DEEMED, IN ARTICLES III AND IV TO BE TOTAL DISABILITY.

"'TOTAL DISABILITY' SHALL BE DEEMED TO BE 'PERMANENT' WHENEVER IT IS FOUNDED UPON CONDITIONS WHICH RENDER IT REASONABLY CERTAIN THAT IT WILL CONTINUE THROUGHOUT THE LIFE OF THE PERSON SUFFERING FROM IT.

"WHENEVER IT SHALL BE ESTABLISHED THAT ANY PERSON TO WHOM ANY INSTALLMENT OF INSURANCE HAS BEEN PAID AS PROVIDED IN ARTICLE IV ON THE GROUND THAT THE INSURED HAS BECOME TOTALLY AND PERMANENTLY DISABLED, HAS RECOVERED THE ABILITY TO CONTINUOUSLY FOLLOW ANY SUBSTANTIALLY GAINFUL OCCUPATION, THE PAYMENT OF INSTALLMENTS OF INSURANCE SHALL BE DISCONTINUED FORTHWITH, AND NO FURTHER INSTALLMENTS SHALL BE PAID SO LONG AS SUCH RECOVERED ABILITY SHALL CONTINUE."

WILLIAM C. DeLANOY, Director.

Approved:
W. G. McADOO,
Secretary of the Treasury.

Regulations and Procedure United States Veterans Bureau, Part 1, Page 9.

It will be noted that Regulation No. 11 recognized the fact that one who was considered totally and permanently

disabled could recover his ability to follow a substantially gainful occupation, thus dispelling the idea of a fixed permanency as meaning forever or unending.

As early as November 26, 1920, the Bureau of War Risk Insurance recognized that the inability to engage continuously in an occupation for a period of six months raised a presumption of permanent total disability and promulgated Regulation No. 57 (subsequently cancelled), wherein it was provided under Subdivision B. thereof:

> "The procedure in making permanent total disability ratings for purposes of insurance, or compensation, or both shall be as follows:
>
> * * * * * * *
>
> "Where the disabled person on the date of the issuance of this regulation or hereafter shall be either an inmate of a hospital or asylum during a continuous period of six months or more, or on the date of this regulation is or hereafter shall be rated as totally disabled or totally and temporarily disabled for a continuous period of six months or more and be unable to follow continuously any substantially gainful occupation during such six months, and in addition at the time of the medical examination hereafter prescribed, shall be found to be in such physical or mental condition as to require further hospitalization or otherwise unable to follow continuously any substantially gainful occupation."
>
> Regulation No. 57, Part I, Regulations and Procedure, U. S. Veterans Bureau, Page 54.

Subdivision 8 of Regulation 57 provides as follows:

> "All terminations of an existing total permanent disability award for compensation and insurance purposes and all reductions thereof shall be effective the last day, inclusive, of the month in which the revised award is made, regardless of the date of the revised

rating. When an award of total permanent disability is terminated under a contract of insurance, the insured should be forthwith notified of the fact and advised that his premium must henceforth be paid if the remaining insurance is to continue in force, and advised of the amount and due date of the monthly premium, and shall be allowed the usual grace period of 31 days from the effective date of the discontinuance of such total and permanent disability payments under the contract of insurance."

A clear import of this regulation is that any one who had a continuous disability for a period of six months and at the end of the six months was unable to follow continuously any substantially gainful occupation should be rated as permanently and totally disabled.

On March 7, 1930, the following regulation or regulatory order relating to the question of "permanency" was issued by Frank T. Hines, then Director of the United States Veterans' Bureau for the observance and guidance by all employees of all stations in that Bureau:

"UNITED STATES VETERANS' BUREAU SERVICE LETTER
DIRECTOR'S OFFICE

March 7, 1930.

Subject: RATING AS PERMANENT TOTAL OF CONDITIONS RESULTING IN ACTUAL TOTALITY WHICH BECOME PERMANENT.

1. For the information and guidance of the rating and appellate authorities of the Bureau, there is attached a copy of the opinion, dated May 15, 1929, of the General Counsel, in the cases of John A. Duggan, XC-292, 238, and William V. Oxley, C-249, 512, which have been approved by the Director.

2. This decision authorizes a determination that permanent totality was in fact existent from the inception of actual totality in those cases where an actual

total disabling effect, shown to have existed uninterruptedly, terminates in a recognized permanent totality or death * * *.

(S) FRANK T. HINES,
Director.

To All Stations."

The rule thus promulgated has been used by officials of the Veterans' Administration in administratively granting for insurance as well as compensation purposes, retroactive permanent ratings effective from the inception of the total ratings when an actual total disabling condition, shown to have existed uninterruptedly, terminates in a recognized permanent totality or death.

In the instant case as we read the decision of the Circuit Court of Appeals it is admitted that the recognized total disability did actually terminate in a recognized permanent total condition.

This order, retrospective in effect by its language and as applied administratively, has been in force for over three years and was never specifically rescinded or cancelled by the Veterans' Administration.

It is urged that as this construction of the word "permanent" has been followed by the executive agency charged with the administration of this law for a considerable period of time, that it should not be disturbed except for very cogent reasons. See *Swendig* v. *Washington Water Power Company*, 265 U. S. 332; 44 S. Ct. 496; 68 L. Ed. 1036.

We urge that the long continued and uniform practice of those officials charged with the duty of administering this regulation is persuasively determinative of its construction. *U. S.* v. *Minnesota*, 270 U. S. 181; 46 S. Ct. 298; 70 U. S. L. Ed. 539.

We therefore urge, as petitioner's "total disability" (inability to follow continuously any substantially gainful

occupation) ripened into a permanent total disability, then under this regulation of March 7, 1930, the insured was *permanently and totally* disabled *ab initio* as of the onset of the total disability (May, 1919); and the permanent rating should cover the entire period of petitioner's total disability.

See—United States Veterans' Bureau Service Letter, Director's Office, March 7, 1930, Subject: "Rating as Permanent Total of Conditions Resulting in Actual Totality which Become Permanent."

V.

THE CONTINUATION OF TOTAL DISABILITY IS A PHYSICAL FACT NOT REQUIRING THE OPINION OF AN EXPERT.

Considerable weight must be given to the fact that the disability in this case has been a fact for a period of over fifteen years and it is recognized in the opinion of the Circuit Court of Appeals for the Second Circuit that petitioner's disability was total while the contract was in force. In their opinion they said:

> "In the present case a jury might find that in May, 1919, the insured could not engage continuously in any gainful occupation."

The disease from which the insured was suffering being total within the meaning of the insurance contract herein sued upon from its inception, we respectfully submit that the physical fact of its continuation for fifteen years was evidence to consider as to whether it was a permanent disability.

Its continuation over these years has been a physical fact. It is not necessary to indulge in speculation, nor to resort to the opinion of an expert to determine that un-

deniable fact. It has been held by this Court, in many cases, that opinion evidence, and even positive testimony, must give way to a physical fact in contradiction thereto, and that a verdict based upon testimony or opinion, as here, which testimony or opinion is positively contradicted by the existence of a physical fact, cannot stand; as has very recently been said by this Court:

> "'A rebuttal inference of fact' must yield necessarily to credible evidence of the actual occurrence." *Pennsylvania R. Co.* v. *Chamberlain*, 288 U. S. 333; 77 L. Ed. 503, 507; 50 S. Ct. 391.

See also:

Gulf M. & N. Co. v. *Wells*, 275 U. S. 455; 72 L. Ed. 370; 48 S. Ct. 151.

Kansas City Southern R. Co. v. *Jones*, 276 U. S. 303; 72 L. Ed. 583; 48 S. Ct. 308.

New York Central R. Co. v. *Ambrose*, 280 U. S. 486; 74 L. Ed. 562; 50 S. Ct. 198.

Atchison, T. & S. F. R. Co. v. *Toops*, 281 U. S. 351; 74 L. Ed. 896; 50 S. Ct. 281.

Southern Ry. Co. v. *Walters*, 284 U. S. 190; 76 L. Ed. 239; 52 S. Ct. 58.

All of the foregoing cases came before this Court on certiorari upon the single question of the sufficiency of the evidence to establish the alleged facts and in each instance it was found by this Court that the testimony in support of the allegations was contradicted by physical fact and that the verdicts could not stand.

In the instant case we have the existence of a physical fact, *viz.*, the existence of this disability over a period of fifteen years. Consequently, the action of the Circuit Court of Appeals in this case in determining a fact contrary to the physical fact after a jury verdict was rendered for the

petitioner constituted an invasion of the province of the jury and such action by the Circuit Court of Appeals is in direct contravention to the constitutional guarantee of trial by jury.

In the case of *Connecticut Mutual Life Insurance Co.* v. *Lathrop*, 111 U. S. 612; 28 L. Ed. 536, the Court said:

> "The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject."

VI.

TO REQUIRE EXPERT MEDICAL EVIDENCE IN ESTABLISHING THE PERMANENCE OF A TOTAL DISABILITY WHILE A CONTRACT OF WAR RISK INSURANCE WAS IN FORCE CONTRAVENES THE RULE OF LIBERAL CONSTRUCTION ESTABLISHED BY THIS COURT.

The Circuit Court of Appeals in holding that the permanence of a total disability at date of lapsation of policy for non-payment of premiums was a fact requiring expert evidence denies the liberality of the construction of the terms of War Risk Insurance policies which this Court has held to be applicable. *White* v. *United States*, 270 U. S. 175; 70 L. Ed. 530; 46 S. Ct. 274; *United States* v. *Arener*, 287 U. S. 470; 77 L. Ed. 372; 33 S. Ct. 238.

VII

A JURY CAN DETERMINE PERMANENT DISABILITY WITHOUT THE AID OF EXPERT MEDICAL TESTIMONY.

We regard the rule of law laid down by the court below, to the effect that from all the evidence in the case the jury

could not determine whether or not the petitioner's disability was permanent at a time when his policy was in force, as unsound, contrary to the fundamental principles of our jury system of trial, and a surrender of the powers vested in the judiciary to the medical profession. We further believe that the court below was announcing facts as a rule of law when it said:

> "They and we manifestly know nothing about it, and the plaintiff's case was not established by proof that epilepsy finally ensued. The only one who can offer convincing testimony on such a subject is an expert. Such a person may be able to say that the conditions in May, 1919 were reasonably certain to produce permanent disability."

We believe it contrary to our system of jurisprudence and inimical to our American institutions for any court to lay down as an absolute unchanging rule that in any particular type of cases the courts are absolutely dependent upon any particular profession for information, and particularly the medical profession (as much as we respect it). This is especially true, because the practice of medicine, while involving the elements of science, is not a science but an art; and we believe that there are many cases involving war risk insurance, in which, where total disability while the policy was in force is admitted, as apparently it was in the instant case, the jury is just as competent to determine from the conditions existing at that time and from subsequent events as to whether the disease or injury was permanent, as a doctor.

Conceding that the opinions of experts may be of great help in making a prognosis at a given time, we do not believe that such opinions are the *sine qua non* of substantial evidence. For example, suppose that a veteran had one leg shot off and an injury to his shoulder, and has spent the

greater portion of his time since discharge in hospitals, and that he has had draining sinuses in both his leg and shoulder and numerous operations thereon and that he was an illiterate laborer. Would anyone contend that it would take a prognosis by a doctor as of the time of his discharge from the army that he was totally and permanently disabled at the time to take the case to the jury? Or suppose that during battle a soldier became obsessed with the idea that he was President of the United States, showed suicidal tendencies, did not recognize his close friends, had hallucinations to the effect that he was the inventor of the telegraph, the radio and the steamship, and on his return to this country was adjudged insane and confined to an asylum where he has ever since remained with a diagnosis of *dementia praecox*. Would it take a doctor in that case to give a prognosis as to the permanency of his condition at the time of discharge in order to take such a case to the jury under the statutes, regulations and decisions relating to war risk insurance? Numerous other illustrations occur to us and demonstrate conclusively the unsoundness of the rule of law laid down by the lower court in this case.

This Court decided this point, we believe, in favor of the petitioner herein when Justice Harlan said:

> "Whether an individual is insane is not always best solved by abstruse metaphysical speculations expressed in the technical language of medical science. The common sense and we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject."
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> *Connecticut Mutual Life Insurance Co.* v. *Lathrop*, 111 U. S. 612, 28 L. Ed. 536.

We believe that the statements of the court below in this case will appear all the more erroneous when one considers the history of the medical profession. At one time the bar-

bers were the surgeons; then there developed various schools of thought, and shortly after the Civil War, it was decided by one branch of those practicing the healing art that it was not necessary to administer medicine or use a knife. In recent years there has developed a school that believes that the manipulation of the vertebræ is a cure all. Vast strides have been made during the past ten years in the diagnosis and treatment of various conditions. Prognoses, diagnoses, and the names of diseases are rapidly changing. Not many years ago the popular thing for doctors to do for a great many diseases was to drain the patient of blood by cupping. It is not uncommon for experts to diagnose and many physicians have each given a different diagnosis for the same patient and prescribed different systems of treatment. And so long as even the most elementary principles of diagnosis and treatment seem to be based upon such shifting sands, we believe that a jury that gets a complete history of the individual person, his educational qualifications before disability, the nature of his disability, his efforts to work and failures thereat, his pain and suffering, his consultation with and treatment by physicians, his record of hospitalization, the economic urge for him to carry on, and all of the various factors that enter into the individual's relation with society, *and particularly the persistence of a total disability over a long period of time*, is in position to pass upon the permanency of a disability without the absolute necessity of having some medical man state that in his opinion it was or was not permanent at a certain time. The upholding of the action taken by the lower court in the instant case would be to invade the province of the jury as to the ultimate fact before it for decision.

We urge that the fact to be proved, *factum probandum*, that is, permanency, is susceptible of proof by many other

facts in many of these cases by evidence other than the opinion of experts. It will be borne in mind that this was not a case of malpractice, where the standards of professional treatment in a certain community are involved. The doing of an improper thing, or the failure to do the proper thing, and many other professional matters are involved in a malpractice case, but not in a case of this type. As wigmore says:

> "There is not and ought not to be any general rule for actions, requiring expert testimony so far as the topic permits of testimony from persons not so qualified."
>
> *Wigmore* (2d) Ed.), Vol. 11, Par. 2090, page 456.

We believe that a war risk insurance case, where the jury has the benefit of all the subsequent history of the individual, is a case susceptible of proof in another manner than by the opinion of experts. The long continuity of conditions related by the various witnesses in this case prior to his discharge and subsequent thereto is cogent evidence, we believe, of permanency.

It was aptly stated by a federal district judge, in a war risk insurance case (*McClovern* v. *U. S.*, 294 Fed. 108).

> "As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

In the case of *Barksdale* v. *U. S.*, (C. C. A. 10) 46 Fed. (2d) 762 at 764, the court said:

> "However this may be, the jury might well have been inclined to take the positive evidence of the plaintiff to the opinion of the medical men which he called in his behalf. Medical men indulge, very generally, in theorizing on the affairs of life, while the living of life is a very practical affair. What it is possible for one

man to do is utterly impossible for another to perform, though apparently both are in the same mental and physical condition. The government inducted boys into the military branch of our country to meet the exigencies of affairs under which Europe suffered without perhaps much thought of their mental power or physical equipment so long as they did not seem to be disqualified. Being in the service, they were granted contracts of insurance on quite reasonable terms, the government and all others knowing full well when it came to a question whether the policy issued to a certain individual had matured under the terms of the contract the question at issue would be whether the particular individual insured, and bringing the action on a particular policy, taking into account the low order of his mentality or his inexperience in the different affairs of life, could follow continuously some gainful occupation in life; that is to say, to make a living for himself and those dependent upon him, even if the only possible occupation open to him was hard manual labor or menial service. It is true, the evidence shows that, after the date at which the plaintiff claims to have become permanently and totally disabled, he did perform some labor, but this neither shows, nor tends to show, he could perform such labor continuously. The energy and ambition of the person must be called into effect. The energy and ambition of plaintiff may have compelled him to try the labor he undertook, although at the time he was absolutely unable to perform the labor undertaken either temporarily or continuously."

We believe that the recent decision of Senior Circuit Judge Parker of the Fourth Circuit Court of Appeals, in which it was held that a case was properly for the determination of a jury in a war risk insurance case even though there was *no medical evidence* on behalf of the plaintiff of any kind or character, is the proper doctrine. *Hicks* v. *U. S.*, (C. C. A. 4) 65 Fed. (2d) 517.

See also:

U. S. v. *Lesher*, (C. C. A. 9), 59 Fed. (2d) 53;
U. S. v. *Meserve*, (C. C. A. 9), 44 Fed. (2d) 549;
La Marche v. *U. S.*, (C. C. A. 9), 28 Fed. (2d) 828;
Mulivrana v. *U. S.*, (C. C. A. 9), 41 Fed. (2d) 734;
U. S. v. *Riley*, (C. C. A. 9), 48 Fed. (2d) 203;
Fladeland v. *U. S.*, (C. C. A. 9), 53 Fed. (2d) 17;
Bartee v. *U. S.* (C. C. A. 6), 60 Fed. (2d) 247;
U. S. v. *Thomas, et al.* (C. C. A. 10), 64 Fed. (2d) 245;
U. S. v. *Tyrakowski*, (C. C. A. 7), 50 Fed. (2d) 766;
Carter v. *U. S.*, (C. C. A. 4), 49 Fed. (2d) 221;
Madray v. *U. S.*, (C. C. A. 4), 55 Fed. (2d) 552;
Malavski v. *U. S.*, (C. C. A. 7), 43 Fed. (2d) 974;
Kelley v. *U. S.*, (C. C. A. 10), 49 Fed. (2d) 897.

We urge that the decision of the court below invades the spirit of the Seventh Amendment to the Constitution, which guarantees a right of trial by jury and prohibits a reexamination of the same in any court of the United States otherwise than according to the rules of common law, and the history of the adoption of the Seventh Amendment, the insistence upon it by the original thirteen States, and the presence of a similar provision in the Constitution of practically every State in the Union demonstrate that the right to a trial by jury is not to be taken away for technical reasons. *Parsons* v. *Bedford*, 3 Pet. 433, 7 L. Ed. 862.

Conclusion.

It is respectfully urged that the question for determination of whether or not petitioner's total disability was a permanent one at date policy lapsed, should be decided upon *all the evidence relevant thereto* and was not dependent upon expert evidence tending to establish this fact, and

the Circuit Court of Appeals erred in over ruling the jury verdict which was in favor of the petitioner.

Respectfully submitted,

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